Supreme Court, U.S.
FILED
JUL 27 2000
CLERK

(15)

No. 99-1178

In The

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE CARGILL, INCORPORATED IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

There are countless intrastate wetlands in this country that have no connection at all with interstate waters nor any substantial (or, in many cases, any) connection to commerce, but are nonetheless subject to federal regulation under the "migratory bird rule." The rule – purportedly grounded on federal Commerce Clause power and adopted without notice and comment procedures required by the Administrative Procedures Act – is an expansive, and really limitless, federal arrogation of traditional state authority over land use. For a bird might at some time alight anywhere, potentially subjecting almost any landowner to federal supervision of land use, exposure to citizen suit, and $27,500 per-day penalties, regardless of any connection of the site to interstate waters or commerce. The rule exceeds federal power and leads to absurd results that have no basis in environmental or commercial policy.

Perhaps no one knows that better than amicus Cargill, Incorporated ("Cargill").[1] Cargill's property was the subject of the first appellate decisions – by the Ninth Circuit – applying the migratory bird rule and upholding it against constitutional attack. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) (*"Leslie I"*); *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) (*"Leslie II"*). The subsequent cases finding the rule constitutional

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[1] Under Rule 37.3(a), the parties have consented to the filing of this *amicus curiae* brief. Letters evidencing that consent are on file in the Clerk's office. This brief has been written only by counsel for Cargill, and Cargill alone has provided the funds for its preparation and submission. S. Ct. R. 37.6.

– including the Seventh Circuit's decision here[2] – look, in turn, to that Ninth Circuit decision. Cargill has twice sought this Court's review of the rule's constitutionality. *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991); *Cargill, Inc. v. United States*, 516 U.S. 955 (1995).

We respectfully submit that Cargill's experience provides important insight into the absurd extremes to which this rule can be taken, and the mischief – bereft of Commerce Clause justification or environmental benefit – it can wreak. For this reason, Cargill submits this brief as amicus curiae, to put the rule and its (ab)use in context.

SUMMARY OF ARGUMENT

The migratory bird rule extends federal CWA jurisdiction to isolated intrastate waters based solely on the use or potential use of those sites by migratory birds. The rule purports to be grounded in federal Commerce Clause power, but as the experience of Cargill and others shows, the rule is based on fictions about attenuated effects on commerce and in practice is used to extend federal power to sites regardless of any real interstate commerce connection. The rule has been used, for example, to exert federal authority over temporary rainwater

[2] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*, 191 F.3d 845, 851 (7th Cir. 1999) ("it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of migratory birds") (*citing Leslie* cases).

collections within artificially-created former solar evaporation ponds; to impose liability and a million-dollar fee award on Cargill in connection with discharges into a fully-contained waste treatment system that allegedly is polluting itself; and to inject federal authorities into local land use matters because of the presence of "wetlands" little bigger than a placemat, or based not on actual bird use but a presumption that any site below the Pacific flyway is subject to CWA jurisdiction. In practical effect, since a migratory bird can alight almost anywhere, the rule has no limit.

The rule rests on the reasoning that reduction of bird habitat reduces birdwatching and hunting, which in turn may affect spending by interstate travelers for those activities, which in turn may affect commerce. But the Court has never endorsed federal regulation of non-commercial activity based on such an attenuated "but-for" chain, and the Court's recent decisions in *Lopez*[3] and *Morrison*[4] reject even less attenuated rationales. In Justice Thomas's words, the migratory bird rule stretches the Commerce Clause power "beyond the breaking point." *Cargill, Inc. v. United States*, 516 U.S. 955, 959 (1995) (Thomas, J. dissenting from denial of certiorari). The Court should hold the rule unconstitutional.

[3] *United States v. Lopez*, 514 U.S. 549 (1995).

[4] *United States v. Morrison*, ___ U.S. ___, 120 S. Ct. 1740 (2000).

ARGUMENT

I. THE EXTREME USES OF THE MIGRATORY BIRD RULE

Cargill and others have seen an expansive assertion of CWA jurisdiction based on the migratory bird rule, divorced from any finding that that activity at the regulated site itself affects commerce (or that the regulation benefits the environment).

A. Cargill's Experience: A Paradigm Of Excess.

Cargill is the successor of Leslie Salt Co. As a consequence, it is the largest private landowner in the San Francisco Bay Area, owning some 17,000 acres and holding a perpetual right for salt-making and related uses over an additional 12,000 acres. Cargill makes salt on much of the acreage, by the process of solar evaporation and precipitation. It is a benign land use, and one that has protected much of the land surrounding the Bay from development, and provides extraordinarily rich habitat for many animal species.

Over the course of 25 years Cargill has seen ever-expanding claims by the Corps and environmental groups of CWA jurisdiction over Cargill's property. Initially, the focus was upon the interrelationship between the CWA Amendments of 1972 (33 U.S.C. §§ 1311(a), 1344(a), 1362(12) and 1362(7)) and the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401, *et seq.*), under which the Corps had historically exercised regulatory authority over navigable waters of the United States. *See Leslie Salt Co. v. Froehlke*, 403 F. Supp. 1292 (N.D. Cal. 1974); *Sierra*

Club v. Leslie Salt Co., 412 F. Supp. 1096 (N.D. Cal. 1976); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978).

In 1986, the Corps and the U.S. Environmental Protection Agency ("EPA"), adopted the "migratory bird rule." *See* 53 Fed. Reg. 20763, 20765. Since then, the Corps, EPA and various non-governmental groups have used the rule to expand CWA jurisdiction and federal control over Cargill's operations and land use. The agencies claimed jurisdiction beyond the true waters that had been the basis for jurisdictional claims before the rule's adoption, and asserted CWA authority over facilities Cargill itself had made, based not on any commercial character of the activity sought to be regulated, but solely on the sites' use or potential use by migratory birds.

1. The First Assertion Of Migratory Bird Rule Jurisdiction: Over An Isolated Artificially-Created Seasonal Pond.

The Corps first asserted regulatory jurisdiction under the migratory bird rule over a section of Cargill's Newark, California salt-production facility. The 12.5 acre site had been a crystalization pond, made by Cargill, that was neither part of nor adjacent to navigable waters, and had no hydrologic connection (surface or otherwise) to any navigable water. It was no longer used for solar salt production, and had no colorable connection to commerce. But in winter and spring "rainwater create[d] temporary ponds" where the human-made crystalization pond had been (*Leslie II*, 55 F.3d at 1391), and migratory birds used them.

The district court found that the periodic collections of rainwater were so temporary and ephemeral that they

did not constitute a waterbody, much less a "water of the United States" that could be subject to the CWA. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 485-486 (N.D. Cal. 1988). The Ninth Circuit, however, reversed in a divided decision. The majority held, without analysis, that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds. . . . " *Leslie I*, 896 F.2d at 360. In dissent, Judge Rymer held that the CWA did not extend to isolated ponds with "no hydrological connection with any other body of water," and that Congress did not mean the "Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as habitat." 896 F.2d at 361 & n.1. The Ninth Circuit remanded the case to the district court for findings on the extent of temporary ponding and migratory bird use.

After the trial court found bird use and consequent CWA authority, the case went again to the Ninth Circuit, where Cargill again challenged the constitutionality of the migratory bird rule. The Ninth Circuit affirmed, holding that an isolated, artificially-created, non-commercial, seasonally ponded and intrastate site was subject to full CWA regulation. The Ninth Circuit reasoned (without considering *Lopez*, which this Court had decided a few weeks before) that because loss of bird habitat affects birdwatchers and hunters, who travel and spend money in their pursuits, which in turn affects commerce, the migratory bird rule – though it "certainly tests the limits of Congress's commerce power and, some would argue, the bounds of reason" – was constitutional:

> The migratory bird rule certainly tests the limits of Congress's commerce power and, some would argue, the bounds of reason. In this case there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the [court's prior holding finding the rule constitutional in *Leslie I*] cannot be considered clearly erroneous on this ground.

Leslie II, 55 F.3d at 1396. The court used the "clearly erroneous" language because it held it was constrained by law of the case to adhere to the holding of *Leslie I* unless it was "clearly wrong." The Court noted, however, that if it were "considering the issue for the first time, Cargill's arguments might well deserve closer consideration." 55 F.3d at 1395.

Thus a one-sentence holding without analysis morphed into law of the case despite this Court's supervening *Lopez* decision and despite the Ninth Circuit's own misgivings; that in turn became the foundation for the circuit court case law upholding the migratory bird rule against constitutional attack.

Cargill, as successor to Leslie Salt Co., petitioned this Court for a writ of certiorari to review the Ninth Circuit's decision in *Leslie II*. Justice Thomas dissented from denial of review, stating that federal jurisdiction over a site that "rests entirely on the actual or potential presence of migratory birds" stretches the Commerce Clause power "beyond the breaking point." *Cargill, Inc. v. United States*, 516 U.S. 955, 959 (1995).

2. The Application Of CWA To A Waste Treatment System That Was Allegedly Polluting Itself.

In 1996, on the strength of *Leslie I* and *Leslie II*, two environmentl groups (San Francisco BayKeeper and Citizens Committee to Complete the Refuge) sued Cargill for alleged CWA violations with respect to a different site in Cargill's salt-making operations – a waste treatment system.

Decades before, Cargill's predecessor, Leslie Salt Co., had created a contained area surrounded by levees of impervious Bay mud and for decades deposited salt-making residues at the 17-acre site, where it was dried and contained. The site was dry or almost dry much of the time, and saline material covered the whole site. Cargill distributed the material unevenly so there was a higher area and a lower elevation (covering some 5 acres) where leachate and runoff liquid could pool and evaporate. The site has been saline-saturated, with no vegetation, since the 1970s, before the CWA even arguably applied to the site. There was no evidence that the deposit of additional saline material since the 1970s has reduced migratory bird use (if any) of the site – not surprising, since saline-saturated is saline-saturated.

In 1979, the U.S. condemned over 15,000 acres – about half Cargill's salt-making acreage – for inclusion in the San Francisco Bay National Wildlife Refuge. (ER 89-100) The site was included not because of any habitat value but because the U.S. needed the adjoining levee and road for access to other portions of the refuge bayward of the levee road. The government knew what

the site was, and granted to Cargill the right to continue to use all the acquired lands for salt-making and related activities.

The Site did not harm the Bay or the nearby slough and wetlands. To the contrary, its whole purpose was to contain all saline runoff and ensure that the adjacent area remained fine wildlife habitat. Even that habitat had no affect on commerce through birdwatching; the individual whose interests supposedly were being protected by the citizen groups admitted she does not "normally recreate in the [area] because it is closed to recreational use . . . " Excerpt of Record at 293, 298, 329, *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032 (pending before 9th Cir.).

Nonetheless, the citizen groups – whose members did not use or visit the site – charged that Cargill was violating the CWA because the waste treatment system was polluting itself, and sought an injunction, penalties and attorneys fees. The theory went like this: the site's higher elevation was a "pile"; brine leached from material deposited on the "pile" or was created by rainwater runoff picking up brine on the "pile"; the brine ran down to and collected in the lower elevations, which the suit called a "pond"; although the site had no vegetation and was often dry, when brine was pooled in the "pond" it contained brine flies and brine shrimp and was sometimes pecked at by migratory birds when their real habitat (the nearby slough and wetlands) was submerged at high tide; so the brine "pond" (while simultaneously being the pollutant) was a "water of the U.S."; and accordingly the site was polluting itself in violation of the CWA.

"The district court – the same judge that had rejected CWA jurisdiction and been reversed in *Leslie I* and *Leslie II* – felt constrained to find the "pond" a "water of the U.S." under the migratory bird rule, and so granted summary judgment for plaintiffs. But the court said application of the CWA to the Site – while perhaps compelled "by the definitions of the Ninth Circuit and the definitions of the regulations" – "doesn't make any practical sense":

> So I believe that the requirements of the regulation are satisfied; that the jurisdictional requirements of being a water of the United States, both under the regulations and under the two Ninth Circuit cases, does satisfy the requirements of being a water of the United States. [¶] That may not be terribly practical. When we have an industrial facility obviously moving around water, moving around salts, producing salt, big wide flat areas obviously with some depressions in them where water can collect or where they've been leveed off for one purpose or another, it doesn't make any practical sense to say, 'Well, we'll take a small area of this and water gets in it, so we define it as a water of the United States.' [¶] Maybe it doesn't, but I have to be governed by the definitions of the Ninth Circuit and the definitions of the regulations, and I think this battle got fought out at least four times in the *Leslie Salt* litigation and that's twice before me and twice before the Ninth Circuit.

Excerpt of Record at 313-14, *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032 (decision of Legge, J.; appeal pending before Ninth Circuit). Indeed, the Court said flat-out that there was "not much environmental value to this property," and that the case was "simply too much litigation over too little." Excerpt of Record (Fees) at 89-91, *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032 (decision of Legge, J., pending before Ninth Circuit). Cargill has appealed the district court's summary judgment to the Ninth Circuit, challenging the citizen groups' standing, the validity of the migratory bird rule generally, and also its application to this site. *San Francisco BayKeeper v. Cargill Salt Division*, No. 99-16032.[5]

The *BayKeeper* case is an example of how the migratory bird rule, bereft of real moorings in commerce, has drifted beyond legitimate Commerce Clause power, and indeed, has been used to torture the CWA itself.[6] The CWA is intended to protect the nation's navigable waters. The site in the *BayKeeper* case does that, by design; it contains and treats waste so none of it – none – discharges to the nearby slough, wetlands, or the Bay. The public (whose money spent birdwatching and hunting ostensibly is aggregated to justify the rule) does not go to those areas, much less to the site itself, and suffers no degradation of birdwatching opportunities elsewhere because the site protects, not harms, bird habitat. Yet the migratory bird rule has been held to apply and, ironically,

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[5] Among other things, Cargill challenges the plaintiffs' standing to bring suit, the court's decision on summary judgment that this is not a "waste treatment system" exempt from the definition of "waters of the United States" and therefore not subject to the CWA under 40 C.F.R. § 122.2, and the finding as a matter of law that there is sufficient bird use when the facts are disputed.

[6] We believe the CWA's legislative history indeed forecloses the rule, but leave that issue to others to brief.

to subject Cargill to injunction and worse for activities that protect, not harm, the environment.

B. Cargill's Experience Is Not Isolated: Other Absurd Assertions Of Jurisdiction Under The Migratory Bird Rule.

Isolated waters are found all over the countryside, and so are the regulatory excesses of the migratory bird rule. A few anecdotes from California illustrate the problem.

On a 523-acre site near Lincoln, California, the Corps found hundreds of isolated "wetlands," as small as 1/10,000 of an acre (4.365 square feet), strewn over the site. Letter from Tom Coe, Chief, Regulatory Unit 1, Sacramento District, Corps of Engineers, to Tom Skordal, Huffman and Associates, and accompanying map (Jan. 4, 1990) (Corps File No. 8900059). The 4.365 square foot wetlands – that's about two feet by two feet – were deemed by the Corps to be "waters of the United States" and subject to full CWA jurisdiction. *Id.* No one can seriously claim that a site little bigger than a placemat has any real effect, much less a direct and substantial one, on commerce. And there is nothing in the rule that limits CWA coverage to placemats; it could equally cover sites as small as napkins. The limit of the rule, it appears, is the area a bird might alight.

In California, EPA has even suggested to the Corps that the Corps assert jurisdiction under the migratory bird rule despite the "lack of actual sightings of birds" at a site. *See* Letter from Harry Seraydarian, Director, Water Management Division, Region IX, EPA, to Colonel Galen

H. Yanagihara, District Engineer, San Francisco District, Corps of Engineers (March 14, 1989). EPA reasoned that even if "actual use" of vernal pools "is not yet documented," the pools "are within the Pacific Flyway," which alone justifies assertion of jurisdiction. *Id.* Thus, EPA has taken the position that in much of California a presumption – not even real bird use – can establish CWA jurisdiction. In practical effect, that means every wet spot in the Bay Area is subject to federal control.

Together, these examples reveal the truth about the migratory bird rule. It really is not tethered to commerce at all. It has been invoked to confer federal jurisdiction over an abandoned artificial crystalizer with no commercial effect, to supposedly self-polluting brine in a contained waste treatment system designed to protect real water; over sites little bigger than a placemat; and indeed, to justify a presumption of jurisdiction over all land beneath the Pacific Flyway regardless of any bird use (and so any even theoretical attenuated commerce connection). Thus, at least in some areas of California EPA says the rule permits a presumption – not even real bird use – to be a proxy for bird use, which in turn is a proxy for birdwatcher interest, which in turn is a proxy for birdwatcher spending, which in turn is a proxy for interstate commerce effect.

If that is within the Commerce Clause's limits, there are no limits. We know of no case that defines Commerce Clause power so broadly, and no case should. To the contrary, the Court's recent Commerce Clause holdings condemn such sweeping assertions of federal power divorced from real and direct commercial impact. We turn to that.

II. THE MIGRATORY BIRD RULE EXCEEDS THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE.

The flight of migratory birds across state lines is not itself interstate commerce; indeed, "the birds obviously do not engage in commerce. Until they are watched, shot at or otherwise impacted by people who do . . . engage in interstate commerce, migratory birds do not ignite the Commerce Clause." J. Blanding Holman IV, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack*? 15 VA. ENVTL. L. REV. 139 (1995).

Neither the Corps nor the lower courts purport to ground the migratory bird rule on federal power to directly regulate commerce. They base the rule on the "aggregate effects" principle: the idea that activity that may not alone justify exercise of federal power may be regulated if "viewed in the aggregate [it] substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 561 (1995). *See, e.g., SWANCC*, 191 F.3d at 850 ("[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many species and consequently the ability of people to hunt, trap, and observe those birds," so "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires."). *See also Leslie*

II, 55 F.3d at 1395-96 ("millions of people annually spend more than a billion dollars a year on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced the populations of many bird species and consequently the ability of people to hunt, trap and observe these birds.") (*quoting Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993)).

We respectfully submit that to uphold federal power under the migratory bird rule, the Court would have to adopt an attenuated "aggregate effects" analysis that expands the Commerce Power beyond where it ever has gone before – really beyond any limit – and impinges on the fundamental rights of states to regulate intrastate land use matters.

A. The Recent Cases Confining The "Aggregate Effects" Principle To Regulated Activities That Are Themselves Commercial.

In a pair of recent cases, the Court has resisted efforts to expand the "aggregate effects" principle to federalize matters that are really local.

In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act despite the government's argument that gun possession near a school constitutes an activity, "which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. 549, 561 (1995). The Court first observed that Congress' criminal statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Id*. Further, the Court noted that "section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme

could be undercut unless the intrastate activity were regulated." *Id.* As a result, the Court concluded that the statute "cannot, therefore, be sustained under our cases upholding regulations" based on an aggregate effects analysis. *Id.* "Even *Wickard* [*v. Filburn*, 317 U.S. 111 (1942)], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." 514 U.S. at 560.

Lopez provided a second, independent rationale for striking down the Gun-Free School Zones Act. It held that an assertion of Commerce Clause power by the federal government must contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." 514 U.S. at 562, *citing United States v. Bass*, 404 U.S. 336, 337 (1971) (interpreting a statute prohibiting gun possession and transport in commerce or affecting commerce to demand an additional nexus to interstate commerce in an individual defendant's case). The statute in *Lopez* failed the Commerce Clause test because not only did the government refuse to provide a nexus to commerce in the statute's application in that case, but "the statute [itself] has no jurisdictional element that might limit its reach to [conduct] that additionally ha[s] an explicit connection with or effect on interstate commerce." *Id.*

Just last term the Court reinforced *Lopez*'s limits on the use of aggregate effects analysis when the Court struck down a section of the Violence Against Women Act. *United States v. Morrison*, 120 S. Ct. 1740 (2000). The Court rejected the law that gave a federal right of action

to women victims of gender-based violence, notwithstanding Congress' heavily documented findings about the effects of gender-based violence on commerce. The Court noted that "in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character." 120 S. Ct. at 1750 n. 4. Although the Court did not need to adopt a "categorical rule" to decide the cases before it, it strongly suggested that the "aggregate effects" principle should be confined to aggregation of regulated activities that are themselves commercial.

> While we need not adopt a categorical rule against aggregating effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

120 S. Ct. at 1751.

Morrison also affirmed *Lopez's* command that a statute must require in each instance of its application an explicit nexus to interstate commerce. *See* 120 S. Ct. at 1750-51. The Court observed that "the second consideration that we found important in analyzing [the statute at issue in *Lopez*] was that 'the statute contained no express jurisdictional element which might limit its reach.' " *Id.* at 1751, *citing Lopez*, 514 U.S. at 562. The Violence Against Women Act, "like the Gun-Free School Zones Act, . . . contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." 120 S. Ct. at 1751. Consequently, the Court struck down the statute as

a regulation of "purely intrastate" activity. 120 S. Ct. at 1752.

Thus, *Lopez* and *Morrison* mandate that a federal law grounded in federal commerce power: (1) cannot be based on attenuated "aggregate effects" of regulated activities that are not themselves commercial; and (2) must include a "jurisdictional element which would ensure, through case-by-case inquiry," that the activity sought to be regulated "affects interstate commerce" (*Lopez*, 514 U.S. at 562).

B. The Court Should Not Expand The "Aggregate Effects" Principle To Obliterate Any Limit On Federal Commerce Clause Power.

We submit that the migratory bird rule cannot survive *Lopez* and *Morrison*. Adopted without notice or comment,[7] the rule is supported by no data or findings on the effects of local use of intrastate isolated waters on commerce. There is on the face of the rule no requirement that the regulated activity at any particular site be commercial, or that anyone seeking to apply the CWA to a particular site prove the activity there has any effect at all on commerce, even indirectly. The rule is the opposite. On its face, the rule does not purport to regulate economic activity, but to regulate discharge (economic or not) into intrastate water bodies that merely "would" be (not are) bird habitat and so "could" (not do) affect interstate

[7] We believe that the rule was adopted in violation of the requirements of the Administrative Procedures Act, but leave that issue to others to brief.

commerce, however minutely or indirectly. It applies regardless whether any migratory birds at a site have attracted out-of-state human visitors, whether bird watchers, duck hunters or anyone else.

Indeed, the rule apparently applies even to sites – like the artificially created waste treatment system in Cargill's *BayKeeper* case – that receive no out-of-state human visitors because the sites are closed or uninteresting to them. In fact, the rule, in importing the definition of "migratory birds" from 50 C.F.R. § 10.13 (1999), does not require that the birds at a site be unusual, or even, for that matter, migratory, to subject the site to CWA regulation. For example, the ubiquitous redwing blackbird is on the list of birds whose presence permits exercise of federal CWA regulation (*id.*), even though people really don't travel interstate to see redwing blackbirds. The rule has been used to assume federal jurisdiction over placemat-size puddles, and indeed, EPA by presumption to all land beneath the Pacific Flyway, without respect to bird use (much less commercial implications of it) at any site. The rule thus ensures that most any site in the country where water can pool and a bird could alight, even briefly, is covered by the CWA regardless whether it has any real interest or value to birdwatchers or other visitors, much less real commercial impact.[8]

Thus, the migratory bird rule cannot meet the test for aggregation that historically has been applied, much less the separate demand for "case-by-case inquiry[ ] that the

[8] Indeed, the rule is so broad it conceivably could apply to backyard puddles or even swimming pools, if the right (or wrong) bird decides to hang out there.

[activity] in question affects interstate commerce." *Lopez*, 514 U.S. at 562. The Corps is not seeking to regulate aggregated "intrastate activity . . . where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751. Thus, the Corps' rule can survive only if the Court (1) dispenses with the need for "case-by-case inquiry" into real commercial effects; and (2) expands the "aggregate effects" principle to include lengthy "but-for" causal chains of fictions: filling or discharging into an intrastate site (which may or may not be economic activity) may affect the habitat of some migratory bird (though it might not really be migratory), which in turn may affect people who travel interstate to watch or hunt birds (though they might not travel to watch that bird, much less at that site), which (if other such sites were aggregated) may affect their interstate spending to watch or hunt birds, which in turn may affect interstate commerce.

Lopez and *Morrison* condemn that. *Lopez* rejected as too "attenuated" the government's arguments that violent crime "imposes substantial economic costs," "reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe," and "poses a threat to the educational process, which in turn produces a less efficient and productive workforce." 514 U.S. at 563-64. Similarly, *Morrison* condemned as "unworkable" a but-for justification for federalizing gender-based crime, even if supported by data showing that such crime reduces people's willingness to travel across state lines. *Morrison*, 120 S. Ct. at 1751. Both cases condemned federal regulation of conduct where there is no assurance case-by-case that the conduct at issue has a commercial effect. Indeed, as *Morrison* explains, if "every

attenuated effect upon interstate commerce" justified federalizing matters of traditional state concern (there, criminal law), then federal law could regulate not only "every crime," but "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." 120 S. Ct. at 1752-53.

Activity found to itself affect interstate commerce may be a proper subject for federal regulation based on Commerce Clause power. But fictions about interstate commerce and attenuated commercial effects offend the Commerce Clause's limits. Land-use regulation is, like the criminal law, an area traditionally left to the states. *See Village of Belle Terre v. Borras*, 416 U.S. 1, 10 (1974). It should no more be usurped by attenuated (and really unsupported) claims of federal commerce interest than the local interest in crime control. Indeed, this is, if anything, an *a fortiori* case. A child's time in a local school, or a woman's safety from violent crime, is more directly and obviously linked to her economic productivity (and so, to commerce) than is a migratory bird's potential use of an isolated intrastate site linked to hypothetical interstate bird watching and trapping (and so, after several more but-for links, to commerce). *See Cargill, Inc. v. United States*, 516 U.S. 955, 957-958 (1995) (Thomas, J., dissenting from denial of certiorari) ("the basis asserted [the migratory bird rule] to create federal jurisdiction over Petitioners' land in this case seems to me to be more farfetched than that offered, and rejected, in *Lopez*"). And the migratory bird rule is not supported even by the kind of "aggregate effects" data found wanting as a basis for the Act in *Morrison*. Isolated intrastate waters – especially

those, like Cargill's, made by people, not nature – that have no direct or substantial commercial affect should be regulated by local government, not by Washington.

Again, Cargill's experience here is instructive. It has twice had its property found subject to CWA jurisdiction with no finding that the activity regulated had any effect on commerce. Indeed, it was subjected to CWA liability and $1 million in fees with respect to activity at an isolated site that for decades has contained and treated waste and been too saline saturated to be real habitat, but is that way precisely so other nearby habitat can thrive. No remedy the CWA permits will improve bird habitat; the site itself will be saline-saturated even under the injunction ordered, and the nearby wetlands are already pristine and vibrant with life. No interstate traveler goes to the site, nor even the nearby wetland, for birdwatching because the area is not open to the public. No discharge or filling by Cargill at the Site would have any effect on birds, much less interstate commerce. We respectfully submit that CWA and the Commerce Clause were never intended to confer federal jurisdiction over such a site.

CONCLUSION

If the "aggregate effects" analysis the Seventh Circuit used to support the migratory bird rule could put the rule within the Commerce Clause's limits, we submit there are no limits. The Court should not read the limits of the

Commerce Clause power out of the Constitution. The decision of the Court of Appeals should be reversed.

DATED: July 27, 2000

Respectfully submitted,

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